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No. 04-340

In the

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, and T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL ASSOCIATION OF REALTORS, PAUL AND SHERRY LAMBERT, AND CHARLES AND NELL SWEENEY IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

1. Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

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INTEREST OF AMICI CURIAE[1]

For more than 30 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF also has participated as amicus curiae in nearly every other major real property takings case heard by this Court in the past three decades.

PLF previously participated as amicus curiae in this case and the related state court case. PLF filed amicus briefs in support of San Remo Hotel, L.P., Thomas Field, Robert Field, and T&R Investment Corp. (Petitioners herein) before this Court (on petition for writ of certiorari), the Ninth Circuit Court of Appeals, the United States District Court for the Northern District of California, the California Supreme Court, and the California Court of Appeal.

Amicus National Association of Realtors (NAR) is a nonprofit association representing over one million members engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this amicus curiae brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution to the preparation or submission of this brief.

professional competence. Its members contribute to such activities as promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, safeguarding real property rights, public service, and cultural diversity. The National Association of Realtors has participated as amicus curiae in numerous property rights cases before this Court, including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Amici Paul and Sherry Lambert (the Lamberts) and Charles and Nell Sweeney (the Sweeneys) each want to build single-family homes on their neighboring beachfront lots located on the island of Maui, Hawaii. The County of Maui initially determined that the Lamberts' and the Sweeneys' homebuilding plans were exempt from coastal zone permitting requirements. The County issued multiple building permits, which were later rescinded without predeprivation notice or hearing, and in violation of the County's procedures which do not allow rescission of coastal zone exemptions or permits. The Lamberts and Sweeneys each filed lawsuits in the federal court to vindicate their federal claims for regulatory takings and due process violations under 42 U.S.C. § 1983, and in the state court for their state law takings and due process claims. In the state court actions, the Lamberts and the Sweeneys reserved their federal claims. Pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), they notified the court and the parties that they were not litigating their federal claims in state court, but were in state court only to ripen their takings claims as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

The case at bar is of overwhelming importance to the Lamberts and the Sweeneys because they suffer from the uncertainty brought about by the rule adopted by the Ninth Circuit that surrenders resolution of federal takings claims to state courts. The Lamberts and the Sweeneys were forced to file multiple lawsuits and must suffer the uncertainty of not knowing whether their *England* reservations will be respected, and whether by pursuing just compensation in state court, their federal claims will be barred by state rules of issue preclusion.

Amici file this brief to assist the Court in considering the conditions under which property owners may present their claims for recovery of compensation for harm to private property under the Fifth and Fourteenth Amendments to the United States Constitution in a federal forum. Specifically, Amici argue that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, on its face, does not deny, and must not be interpreted to deny, property owners the opportunity to have federal takings claims heard and decided in federal courts.

SUMMARY OF ARGUMENT

The special ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), regularly are applied to preclude property owners from litigating federal takings claims in the federal courts. That is not what this Court intended; *Williamson County* itself holds out the promise of federal adjudication of federal takings claims. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), this Court emphasized the importance of allowing litigants to have their federal claims decided in the federal courts. It is just as important to the development of the law. The federal courts are precluded from defining the contours of federal takings law when federal takings claims are relegated to the state courts.

England offers a procedure by which claimants who are in state court against their will are able to reserve their federal claims for subsequent federal adjudication. This Court should make it clear that when property owners are forced into state court to ripen their takings claims, and when those claimants expressly reserve their federal claims for later resolution in federal court, the state-law claim will have no preclusive effect in the subsequent federal action.

ARGUMENT

I

THE PLAIN LANGUAGE OF *WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION* SAYS THAT FEDERAL TAKINGS CLAIMS ULTIMATELY CAN BE RESOLVED IN FEDERAL COURTS

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. at 195, this Court established a test for determining if a takings case is ready to be heard in federal court. First, administrative action must be final, and second, a plaintiff must have sought "compensation through the procedures provided by the State." *Id.* Only the second requirement is relevant to the instant case. And as to that requirement, this Court explained that

> because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation *before* bringing a § 1983 action.

Id. at 195 n.13 (emphasis added).

The plain language of *Williamson County* holds out the promise of federal adjudication of a federal takings claim.

> Throughout the opinion, the Court returns to these twin concepts [not ripe and premature], emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that land use cases *can be ripened* and *then litigated in federal court*.

Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 104 (2000) (emphasis added). *See* Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("The language of *Williamson* suggests that a federal claim will survive after disposition in the state court.").

The requirements of *Williamson County*, considered in isolation, seem clear. For a short time, property owners could still bring takings claims in federal court on the grounds that a State did not provide an adequate remedy. *Williamson County*, 473 U.S. at 194, 197 (The ripeness requirements apply "if a State provides an adequate procedure for seeking just compensation."). But two years after *Williamson County* was decided, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987), this Court said that state courts must provide adequate procedures for recovery of just compensation when government takes private property. *Williamson County* and *First English*, read together, require that property owners seek and be denied compensation in state court before bringing a federal takings claim in federal court. *See* Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 Urb. Law. 941, 950 (2000).

Any hint of clarity disappeared when the lower federal courts were forced to resolve the preclusion questions that inevitably arose when property owners appeared in federal court after seeking to ripen their federal takings claims in state court as required by *Williamson County*. The ever increasing body of case law reflects the inability of most lower federal courts to resolve the questions in a manner that avoids long, onerous litigation and that ultimately allows property owners to litigate their claims in federal courts. The case presently before this Court provides a good example. Another good example is found in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd I*), and *Dodd v. Hood River County*, 136 F.3d 1219, 1224 (9th Cir. 1998) (*Dodd II*), *cert. denied*, 525 U.S. 923 (1998). In *Dodd I*, 59 F.3d at 862, the Ninth Circuit Court of Appeals ruled that claim preclusion did not prevent litigation of the Dodds' federal takings claim in federal court after they had litigated their state takings claim in state court. The Dodds had expressly reserved their federal claim pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411. *Dodd I*, 59 F.3d at 857, 862. The Ninth Circuit Court disagreed with a suggestion that "*Williamson County* is a thinly veiled attempt by the [Supreme] Court to eliminate the federal forum for Fifth Amendment taking plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedure in the state court." *Id.* at 861. The Dodds returned to the Federal District Court, which then held that issue preclusion barred litigation of their federal claim in federal court; the Ninth Circuit Court affirmed. *Dodd II*, 136 F.3d at 1227-28. The federal forum was effectively eliminated in spite of the Ninth Circuit Court's belief that was not the intent of *Williamson County*.

The lower federal courts' application of the standard rules of issue preclusion to cases ripened under *Williamson County* ensures that most takings claims can never be litigated in federal court. *Williamson County* does not, as the plain language of the opinion states, present a temporary delay on the path to federal court. Rather, as applied by the lower federal courts, *Williamson County* sets a permanent jurisdictional bar by applying state rules of issue preclusion when property owners attempt to have federal takings claims heard in federal court. *See* J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 240 (2003). *Also see* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 234-36 (1999), which includes testimony of Daniel R. Mandelker[2] before the House Judiciary Committee Subcommittee on Courts and Intellectual Property. Professor Mandelker expressed his opinion that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." *Id.* at 236.

If the absurdity of extinguishing federal takings claims by ripening them is not readily apparent, it becomes so when the *Williamson County* ripeness requirements are applied to claims brought to protect other federal constitutional rights, such as, in the example below, free speech.

> [A] mayor objects to a speech critical of his administration and refuses to allow it to be delivered

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[2] Professor of law at the University of Washington in St. Louis, Missouri, and a prolific author on the law of zoning and land use planning.

> in the city's main square or on its public cable TV station for that reason. The speaker goes to federal court, which exercises *Pullman* abstention. She then bargains with the mayor's office over possible revisions to her draft, each time being turned down with the encouragement to try again. Finally, she obtains a denial or determines that further application is futile. Then she works her way through the hierarchy of state courts. Several years later, she gets back to federal court, only to learn that the local trial court determinations of critical facts and the state intermediate court's rulings of law are dispositive of the issues.

Steven J. Eagle, *Regulatory Takings* § 13-5(d) at 1069-70 (2d ed. 2001).

The duplicative, protracted, and ultimately unsuccessful procedures for ripening a federal claim for violation of the right to free speech are ridiculous; they are no less so in the context of constitutional property rights. But the fact is that *Williamson County* presents "a special ripeness doctrine applicable only to constitutional property rights claims." Timothy Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W.L. Rev. 1, 2 (1992). Others seeking to vindicate their federal constitutional rights under 42 U.S.C. § 1983 can choose between the federal and state courts in the first instance. 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation*, ch. 1, § 1.1, at 1-3 to 1-4 (2004). Under *Williamson County*, those seeking to enforce rights secured by the Fifth Amendment to the United States Constitution do not have a choice.

After this Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), state and local government defendants can remove Takings Clause claims from state court. So, "[a]pparently only property owner takings and substantive due process claims are relegated to state court review under the *Williamson* ripeness doctrine." Robert H. Freilich, et al., *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 (1999).

Others are equally dismayed.

> [I]f we were to take the *Williamson County* reasoning as reflecting reasoned constitutional doctrine, we would have to conclude that plaintiffs claiming any deprivation of constitutionally protected rights without due process of law–the life's blood of 42 U.S.C. § 1983 litigation—should not be able to sue in federal courts either, without a preliminary detour through the state courts in an effort to secure from them the lacking due process. But that, of course, is not generally prevailing law—it is only a "rule" concocted specifically for plaintiff-landowners seeking redress of violation of their constitutional property rights in the context of land-use regulations.

See Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 327-28 (1998).

This different treatment of takings plaintiffs exists in spite of this Court's pronouncement that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v.*

City of Tigard, 512 U.S. 374, 392 (1994).[3] If that is so, it is inconceivable why application of *Williamson County*'s ripeness doctrine makes state courts the first and only arbiters of federal constitutional takings claims brought pursuant to 42 U.S.C. § 1983, which Congress enacted for the specific purpose of opening "the doors of the United States courts' to individuals who were threatened with, or who suffered, the deprivation of constitutional rights . . . ." *See Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 504 (1982) (citations omitted).

II

FEDERAL COURTS MUST DEFINE THE CONTOURS OF FEDERAL TAKINGS LAW; THAT RESPONSIBILITY CANNOT BE LEFT TO THE STATE COURTS

When federal judges exercise their federal-question jurisdiction under the "judicial power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several states—to interpret federal law." *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000).

[3] In dissent to a property rights decision by the California Supreme Court, Associate Justice Janice Rogers wrote as follows: "The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty." *Galland v. City of Clovis*, 16 P.3d 130, 166 (Cal.) (Brown, J., dissenting), *cert. denied*, 534 U.S. 826 (2001).

The federal courts do not contribute to the development of the law pertaining to Fifth Amendment takings when takings claims ripened through state procedures are precluded from resolution in the federal courts by claim or issue preclusion. State courts will decide when compensation is appropriate and how it should be measured (*see* George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465, 475 (2000)), and the only remaining federal court review is direct review by this Court (*see id.* at 466). Some commentators suggest that is acceptable,[4] but this Court disagreed in *England v. Louisiana State Board of Medical Examiners*. In *England*, this Court said that appellate review by the High Court does not provide adequate recourse to those who want to litigate federal claims in federal court.

> It is true that, after a postabstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review . . . is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional

[4] *E.g.*, Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman, *and Res Judicata*, 31 Envtl. L. Rev. 10353, 10354 (2001); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1, 34-47 (1999).

> claims turn upon the resolution of contested factual issues. There is always in litigation a margin of error, representing error in factfinding . . . . Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

375 U.S. at 416-17 (internal quotations, citations, and footnote omitted).

England is an abstention case, not a takings case, but this Court's words are equally relevant to Fifth Amendment takings cases.

> [A]s the Court acknowledged in abstention cases, it now seems necessary, as the lowest level of protection affordable to Fifth Amendment property rights, for the Court to acknowledge that in the unique class of land use ripeness cases a trial in state court may be a precondition designed to weed out the cases where relief is granted by state law. Obtaining state court relief may moot the federal issue, but unsuccessful state court litigation "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal courts."

Berger, *Supreme Bait & Switch*, *supra*, at 129-30 (quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 417).

In *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 129 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 104 (2004), the Second Circuit Court of Appeals applied the

reasoning of this Court's decision in *England v. Lousiana* to conclude that issue preclusion would not bar litigation of a federal takings claim even though Santini initially filed a state takings claim in state court, and litigated and lost that claim before proceeding to federal court. The Court acknowledged that the procedural posture of Santini was different from that of *England*, but said that the distinction "is not a meaningful one." *Id.*[5] The Second Circuit Court, citing to *England v. Louisiana*, relied on the fact that the claimant was not voluntarily litigating his claim in state court. *Id.* at 130. The Court refused to believe that *Williamson County* was intended "to deprive all property owners in states whose takings jurisprudence generally follows federal law . . . of the opportunity to bring Fifth Amendment takings claims in federal court." *Id.* at 130.

The *Santini* Court took what it termed a "middle ground" by recognizing that the preclusion issues arising under *Williamson County* ripeness can be resolved by allowing property owners to reserve their federal claims for later resolution in federal court, and by denying the state-law claim any preclusive effect in the subsequent federal action. *Id.* at 128, 130. One commentator refers to this sort of approach as a "multijurisdictional solution[]." *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211 (2004). Professor Friedman argues that

> [t]he primary obstacle to a coherent theory of jurisdictional allocation is "either-or" thinking. When scholars and judges discuss jurisdictional

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[5] The Second Circuit Court also recognized that other states do not preclude a claimant from bringing a federal takings claim in state court, as does Connecticut. But, the Court explained, that does not matter. In *England* this Court relied on the fact that the plaintiff was not voluntarily in state court. *Id.* at 130 n.7.

> allocation, the common assumption is that cases must be litigated either in federal or in state court. Rarely is the answer thought to be "both."

Id. at 1214.

But, Professor Friedman continues: "[w]hen interest analysis so requires, cases should be litigated in both the state and federal court systems." *Id.* at 1211. In other words, some cases implicate both state and federal interests, and those cases cannot be assigned to one court without sacrificing the interest of the other. Interest analysis would then require a multijurisdictional approach. *See id.* at 1214, 1274. Such multi-jurisdictional solutions are used in the areas of habeas corpus and certification.[6] *Id.* at 1214.

Professor Friedman recommends expanding use of the *England* doctrine to employ multijurisdictional solutions to state civil cases, such as those where takings plaintiffs are forced into state court under *Williamson County*. *Id.* at 1264, 1268-70. "Preclusion law should provide no more of an obstacle [when litigating a takings claim] than it did in *England* itself." *Id.* at 1270.

Rigid adherence to either-or thinking creates serious problems. For instance, interpreting *Williamson County* in such a way as to cut lower federal courts out of federal takings cases ignores the distinct roles of the Federal Constitution and state constitutions. The United States Constitution "prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise." *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871

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[6] "[C]ertification procedures serve the state interest of allowing a state's highest court to provide an authoritative interpretation of the meaning of state law in a case otherwise properly litigated in federal court to serve federal interests." *Id.* at 1214.

(1990). Thus, it is the federal courts that must set the floor for federal constitutional rights and define the contours of federal law.

State courts are free to interpret rights in state constitutions differently than federal courts interpret similar federal constitutional rights. And, particularly in the area of property rights, they do so regularly. One commentator explored the influence of three of the most prominent modern Supreme Court takings decisions,[7] and concluded that the majority of state court cases mention Supreme Court decisions much more than they actually rely on them.

> The vast majority of state cases often make trivial, passing references to the Supreme court holdings [in *Nollan*, *Lucas*, and *Dolan*]. . . . The U.S. Supreme Court's doctrine has not been ignored by the state courts, but it generally has not been utilized as a basis for limiting community and state land-use and environmental regulation.

Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 Fordham Envtl. L.J. 523, 555 (1995). Although the Supreme Court has handed down a number of what could be termed "pro-landowner" decisions, statistics show that government "overwhelmingly wins litigation" in the state courts. *Id.* at 555.

The California state courts present a particularly egregious example of how some state courts "apply" federal takings decisions. Since 1987, only one published California state court decision has awarded monetary damages in compliance with the "self-executing" nature of the Just Compensation

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[7] *Dolan v. City of Tigard*, 512 U.S. 374, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Clause. *See Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Ct. App. 1999). For a general description of California's abysmal record in the takings arena, *see* Breemer, *supra*, at 260-63. *Also see San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002) (Brown, J., dissenting), wherein Associate Justice Janice Brown noted that private property is an endangered species in California, and "is now entirely extinct in San Francisco." *Id.* at 120. Justice Brown expressed her "hope the plaintiffs find a more receptive forum in the federal courts." *Id.* at 128.

Federal takings claimants should have the same access to the federal courts as do other constitutional claimants. The federal courts and federal civil rights law were established to provide constitutional claimants with a judicial forum free from local politics and biases.[8]

> Federal judges tend to have broader outlooks than local judges constrained by ethos and electorate of their communities. The fact that there are apt to be more competing interests in their districts also makes them more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.

Steven J. Eagle, *Regulatory Takings*, § 13-5(d), at 1069 (2d ed. 2001).

[8] *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 704-06 (2004). The authors explain that the theory of protecting federal rights in federal courts dates to the founding of the Republic, and that one reason for adopting the Civil Rights Act was to provide a federal forum.

Strict adherence to the traditional rules of issue preclusion does not allow federal takings claimants to litigate their federal takings claims in federal court, and does not allow the federal courts to shape federal takings law. If *England* and *Williamson County* are to have any practical meaning, then, in the face of a proper reservation, a state-court judgment should have no preclusive effect whatsoever on a later federal claim.

CONCLUSION

This Court phrased the *Williamson County* prerequisites to federal takings litigation in terms of ripeness. The ripeness inquiry in a takings claim involves a determination that a property owner has exhausted all avenues for obtaining compensation.[9] The ripeness requirements cannot and should not extinguish the opportunity to litigate in federal court. As the Second Circuit Court of Appeals recently noted, such a result "would be both ironic and unfair." *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d at 130.

Amici Pacific Legal Foundation, National Association of Realtors, Paul and Sherry Lambert, and Charles and Nell Sweeney respectfully request that this Court recapture the role of the federal courts in developing federal takings law. Amici respectfully request that this Court rule that where takings claimants are forced to ripen federal claims by pursuing state claims in state court, an express reservation of federal claims

[9] Laurence H. Tribe, *American Constitutional Law* 337 (3d ed. 2000).

will actually preserve those claims for litigation in federal court because the normal rules of claim preclusion do not apply.

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Respectfully submitted,

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